Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE J. ARNOLD, JR., *et al.*,
Petitioners

v.

POSTMASTER GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

GEORGE KAUFMANN
(Counsel of Record)
JOSEPH E. KOLICK, JR.
CYRIL V. SMITH
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

California Brewers Assn. v. *Bryant*, 444 U.S. 598 (1980) 6
Connecticut v. *Teal*, 457 U.S. 440 (1982) 2, 3, 4, 5, 7
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 2, 4, 5, 6, 7
Los Angeles Dept. of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 5, 7
Nashville Gas Co. v. *Satty*, 434 U.S. 136 (1978) 4, 7
Texas Dept. of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 8
Wards Cove Packing Co. v. *Atonio*, —— U.S. ——, 109 S.Ct. 2115 (June 5, 1989) 2, 3, 5, 7, 8, 9

Statutes

Age Discrimination in Employment Act of 1967, 81 Stat. 603, as amended, 29 U.S.C. §§ 623 and 633a ..... *passim*
Civil Rights Act of 1964 § 703(h) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-8

CLYDE J. ARNOLD, JR., *et al.*,
Petitioners

v.

POSTMASTER GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT [1]

I.

The first question presented is whether the Court of Appeals properly rejected petitioners' disparate impact challenge to the Postal Service's "senior-first" practice—whereby senior employees are selected first for *involuntary* transfers—on the ground that this practice must be

---

[1] Throughout this Reply, "Pet." will refer to the Petition for Writ of Certiorari. "A." will refer to the Appendix to the Petition, and "Br. Resp." will refer to the Brief of the Respondent in Opposition.

viewed in light of the Service's Career Path Policy ("CPP") as a whole. In urging that the "court of appeals did not err," respondent observes ["t]hat there is nothing *novel* about viewing the plan as a whole." Br. Resp. 4, citing *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1977). This proves far too little, because this Court has long since rejected *General Electric*'s analytic approach.

a. *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S.Ct. 2115 (June 5, 1989) emphatically disapproved the "as a whole" approach to disparate impact claims: "Our disparate-impact cases [most notably *Connecticut* v. *Teal*, 457 U.S. 440 (1982)] have always focused on the impact of *particular* hiring practices on employment opportunities for minorities." 109 S.Ct. at 2124, emphasis in original. Even as the Court rejected the attempt of the *Wards Cove* plaintiffs' to predicate their *prime facie* case on evidence that *on the whole* the employees' practices had excluded minorities, the Court reaffirmed that a defendant employer cannot prevail by showing that

> the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, [because the employees] would still have a case under Title VII, if they could show that *some particular hiring practice* has a disparate impact on minorities, notwithstanding the bottom-line racial balance in [the employer's] workforce. See *Teal*, *supra*, at 450. [109 S.Ct. at 2123, emphasis added.]

Respondent says nothing which can reconcile the decision below with *Wards Cove*. The sentence from *Wards Cove* which is quoted in part at Br. Resp. 6, n.3, *reiterates* the holding that a disparate impact claim must establish the discriminatory effect of each challenged practice. That sentence reads: "[Plaintiffs] will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, *specifically showing that each challenged*

practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Id.* at 2125, emphasis added. That is precisely what plaintiffs showed in this case, as the District Court found. A. 64-81.

Respondent asserts that "petitioners have attacked the CPP" (Br. Resp. 6, n.3); on the contrary, petitioners attacked *the senior-first practice.* See A. 66-67 (District Court opinion). That was the precise ground on which the Court of Appeals faulted petitioners and set aside the District Court's judgment. A. 8-10. *Wards Cove,* decided after the Court of Appeals denied rehearing, confirms that this holding was error.

Respondent observes that in *Wards Cove,* the Court did not address what sorts of employment practices should be considered together and what sorts of employment practices should be analyzed separately." Br. Resp. 6, n.3. If, as Respondent thereby suggests, *Wards Cove* and its antecedents leave open the possibility that there may be *some* "sorts of employment practices [that] should be considered together," this would militate strongly in favor of, rather than against, review in order to give guidance to the lower courts and litigants. At all events, it is clear that the decision below and *Wards Cove* cannot coexist without creating new confusion with respect to the mode of analysis of discrimination claims based on the "disparate impact" of an employmet practice.

b. Respondent's attempt to distinguish *Teal* is without substance. As noted at Br. Resp. 5, the test which was there invalidated "constituted a 'pass-fail barrier to employment opportunity' (457 U.S. at 452), and rejected the employer's bottom line rationale because it did not remedy the adverse effect of the test on those individuals who failed it." The senior-first practice establishes a "pass-fail barrier" in the same way because it directly and automatically imposes on older employees the "adverse effect" (*id.*) of involuntary transfer to an MMA. See Pet. 13.

Respondent observes further that "*Teal* 'focused on employment and promotion requirements that create a discriminatory bar to *opportunities*' (457 U.S. at 450 (emphasis by the Court))." Br. Resp. 5. Insofar as Respondent seeks to distinguish between "opportunities" and certainties, and to convey the impression that all Level 23 employees would *inevitably* have to work at an MMA at some time in their career, the implication is contrary to the District Court's findings (A. 49-50), which were not disturbed on appeal. See Pet. 17, n.9. Respondent's own witness testified (and it is clear on the face of the CPP itself) that not every Level 23 employee would be required to work at an MMA. See Pet. 5. Cf. Respondent's careful formulation, "Postal inspectors are *expected to* work at least five years in an MMA." *Id.*, amphasis added.[2]

If Respondent is also attempting to distinguish between opportunities for employment benefits and "burdens of employment" (*id.* 6), with the implication that *Teal* does not apply to the latter, the proposed distinction wrests the quoted passage out of its context in *Teal* and lacks any basis in antidiscrimination law. Indeed, when this Court did differentiate between benefits and burdens, it held employers to a *stricter* standard of equal treatment in the distribution of burdens. See *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142 (1978), distinguishing *General Electric* on this basis. ("Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a sugbstantial burden that men need not suffer.") The assertion that the CPP "insures that the burdens of employment are distributed fairly * * *" (Br. Resp. 6) confuses "the *purpose* of the senior-first rule"

---

[2] See also Br. Resp. 2 ("* * * all level 23 inspectors *should* spend five years in an MMA during the course of their service, (emphasis added); *id.* at 8 ("* * * all eligible level 23 inspectors, young or old, *should expect to* serve five years in an MMA (emphasis added)."

(A. 11, emphasis added) with its actual effect; since not all level 23 employees will have to work in an MMA, this practice "falls more harshly on the postal inspectors 40 years of age and above than the postal inspectors under 40 years of age," as the District Court found. A. 72. It therefore distributes the burdens not "fairly," but in violation of the ADEA.

c. *General Electric Co.* v. *Gilbert*, *supra*, cited at Resp. Br. 4 and 7, has not only been superseded by *Teal* and *Wards Cove;* it was distinguished on the very point for which Respondent cites it by *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), cited at Pet. 12, n.6.[3] *Manhart* was, in turn, followed in *Teal*, where this Court said:

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individ-

[3] In *Manhart* the Court explained:

> In *Gilbert* the Court did note that the plan as actually administered had provided more favorable benefits to women as a class than to men as a class. This evidence supported the conclusion that not only had plaintiffs failed to establish a prima facie case by proving that the plan was discriminatory on its face, but they had also failed to prove any discriminatory effect.
>
> In this case, however, the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department. [435 U.S. at 715-16, footnotes omitted.]

ual is unambiguous." *Id.* at 708. [457 U.S. at 455.]

d. In *California Brewers Assn.* v. *Bryant*, 444 U.S. 598 (1980), cited at Br. Resp. 5, no question of "disparate impact" was raised or decided. The issue was whether the challenged employment practice was or was not "a 'seniority system' or part of a 'seniority system' within the meaning of § 703(h)," *id.* at 601, and, therefore, "exempt from the normal operation of Title VII," *id.* at 607. That is the issue decided *id.* at 605-11 to which Respondent refers.[4] Since "the principal feature of any and every 'seniority system' is that *preferential treatment* is dispensed on the basis of some measure of time served in employment" (*id.* at 606), Respondent's reliance on *Bryant* to support a practice which *disfavors* senior employees is bizarre.

e. According to Respondent, the Court of Appeals' use of the term "freestanding" is "simply a short-hand method of distinguishing between * * * 'a pass-fail barrier to employment opportunity' (457 U.S. at 452)—which *can* form the basis for a finding of disparate impact—and one provision of a 'plan' or 'package'—on which such a finding cannot be based. See *General Electric Co.* v. *Gilbert*, 429 U.S. at 138." (Br. Resp. 7, emphasis in original.) The foregoing attributes to the Court of Appeals an argument which was pressed upon it by Respondent,[5] but which the Court did not accept.[6] It be-

---

[4] The Court of Appeals, having concluded that the challenged practice was not exempt under § 703(h), had remanded the case to the District Court to enable the plaintiff to prove that it "has had a disparate impact on negroes * * *." *Id.* at 605.

[5] See Brief for Appellant, p. 20:

> The heart of this action is whether the various components of the CPP should be analyzed as an integrated "package" under the *General Electric Co.* v. *Gilbert*, 429 U.S. 129 (1976), line of cases or as separate, discrete practices under the *Connecticut* v. *Teal*, 457 U.S. 440 (1982), line of authority.

[6] See A. 8-10. Notably, the Court nowhere cites *General Electric* or refers to a "package" or a "plan."

speaks little confidence in the merit of the Court of Appeals' decision that in defending it Respondent deems it necessary to resuscitate *General Electric*. As we have shown, *Nashville Gas* holds that *General Electric* does not apply to a rule which imposes special employment burdens on a protected group, and with respect to fringe benefit plans the presently controlling precedent is not *General Electric* but *Manhart*. *See supra*, p. 4, and p. 5. If Respondent is also arguing that an employment practice which is part of a "plan" cannot form the basis of a dispaarte impact finding, the argument is at war with *Teal*, for the challenged test was part of Connecticut's overall plan for selecting employees for promotion, just as the senior-first rule is part of the Postal Service's plan for selecting employees to work in MMAs; so too, that rule constitutes a "pass-fail barrier" no less than the *Teal* test. See p. 4, *supra*. Thus, if antidiscrimination law draws a line such as Respondent posits, this case is on the *Teal*—and *Wards Cove*—side of it. Moreover, since *Teal* followed *Manhart* without suggesting that there is any difference in analysis between the cases (see p. 5, *supra*), it is plain that Respondent's proposed distinction is without legal significance.

II.

a. The second question presented raises two issues concerning the Court of Appeals' rejection for petitioner's disparate treatment claim. The first of these is whether the court erred in requiring proof of animus to sustain that claim despite the Chief Postal Inspector's admission that he *knew* that the senior-first rule would select the older inspectors for directed transfer. See the District Court's finding, A. 73-74, 79, 83, cited at Pet. 20. The Court of Appeals excused the Service because the rule was "*both rational* and devoid of any implication of animus." A. 11, emphasis added to show the critical words omitted at Br. Resp. 8. Respondent says that "the court of appeals not only found no animus, it also

found that there was no discrimination against older employees." *Id.* The language which Respondent quotes cannot bear this meaning. The Court therein expressly referred to "'the *purpose* of the senior-first rule.'" *Id.*, quoting A. 11, emphasis added. Moreover, the sentence immediately preceding those from which Respondent quotes reads in full: "Because the senior-first rule does not stand alone, however, it is neither fair nor reasonable *to judge the motives* of the Inspection Service by uncoupling the rule from the other aspects of *what was clearly intended* to be an integrated program." *Id.* emphasis added.

b. The second issue on the disparate treatment phase of the case is whether a court may supply its own justification for an employment practice which the employer never articulated. Pet. 22-23. Respondent denies "that the court of appeals, rather than the Postal Service, articulated that justification of CPP." Br. Resp. 8, n.5. In support, Respondent cites only a passage from p. 47 of its *brief in the Court of Appeals.* This is plainly insufficient to meet our point since, under this Court's precedents, a nondiscriminatory jurisdiction must be established by evidence in the trial court, rather than by argument on appeal. *Wards Cove*, 109 S.Ct. at 2126, following *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). See Pet. 23. Moreover, the argument to which Respondent now refers was presented not to supply a justfiication for the senior-first rule but only to urge (unsuccessfully) that all inspectors would have been transferred whether or not that rule was used. In fact, the Service did advance three justifications through testimony in the District Court, but this was not one of them. See A. 76 and Pet. 23, n.13. After having been rejected by the District Court, these were reasserted at pp. 39-40 of the Service's brief below.

Respondent closes by asserting that senior-first rule was designed to take advantage of older Inspectors' skills

by assigning them to areas with the most complex caseloads. Br. 9, n.6. Notwithstanding the careful qualification "to the extent that", Respondent thereby admits a conscious decision to select older employees for transfer to vacant positions in MMAs (amplifying the Chief Postal Inspector's testimony, p. 7, *supra*), and that in fact older Inspectors *were* required to work in MMAs in preference to their younger colleagues.[7] This is tantamount to a confession that the senior-first policy provides for disparate treatment in violation of the ADEA. For the true "aim of the ADEA" (Br. Resp. 9, n.6) to protect older workers can only be defeated if their abilities are recognized by imposing special burdens on them.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari, the Petition should be granted. The case should be set for briefing and argument or alternatively remanded for reconsideration in light of *Wards Cove Packing Co.* v. *Atonio.*

Respectfully submitted,

GEORGE KAUFMANN
(Counsel of Record)
JOSEPH E. KOLICK, JR.
CYRIL V. SMITH
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

[7] Respondent's point was asserted as a business justification to petitioner's disparate impact claim but was rejected by the District Court. A. 77.